

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELLISON MINGO,

Defendant-Appellant.

UNPUBLISHED
August 9, 2005

No. 253182
Wayne Circuit Court
LC No. 03-008894-01

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Ellison Mingo was charged with assault with intent to do great bodily harm less than murder¹ and possession of a firearm during the commission of a felony.² Following a bench trial, the trial court convicted Mingo of felonious assault³ and felony-firearm. The trial court sentenced Mingo to time served for the assault conviction and to the mandatory two-year term for felony-firearm. Mingo appeals as of right, and we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

This case arose when Mingo shot a man named Sherman Shearill on September 5, 2002. According to Shearill, Mingo approached him as he was walking down the street and asked him “a couple of questions about calling his son gay or something.” Shearill told Mingo “that I didn’t want to listen to what he had to say,” and continued walking down the block, then turned the corner. Mingo followed him and attempted to engage him in conversation, but Shearill stopped and told him that it was his birthday, and he did not feel like talking to Mingo. Mingo told Shearill, “say, well, Happy Birthday.” This struck Shearill as funny and he started laughing, then he continued on his way. However, Mingo continued to follow him, and when Shearill told Mingo to leave him alone, Mingo punched him twice in the mouth. Shearill “started throwing punches back,” when suddenly Mingo produced a large handgun, only to have the clip fall out.

¹ MCL 750.84.

² MCL 750.227b.

³ MCL 750.82.

Shearill “was stunned” by the presence of the gun. Mingo told Shearill “don’t move,” and he retrieved the clip and reinserted it. Shearill told Mingo he was not afraid of the gun, and Mingo told him not to say another word, but when Shearill turned and walked away, Mingo followed with the gun in his hand, saying, “What you got to say now, what you got to say now, huh.” Shearill again told Mingo “that I wasn’t scared of him or the gun.” Mingo, who had been pointing the gun at Shearill’s torso, lowered it so it was pointing “straight at my legs” and fired once, striking the side of Shearill’s right calf. Mingo then asked, “What you going to do now, huh?” Shearill claimed to be unarmed during his encounter with Mingo.

After the police located Mingo, they read him his rights and questioned him. Mingo told the investigating officer that he got into an altercation with Shearill, who had yelled at Mingo’s kids and threatened to “blow up my house, my family and kids, kill my family.” Mingo said that Shearill “rushed” him and began punching him, so he punched back. Mingo denied having a gun. He claimed that either Shearill “or his buddies” had dropped a gun on the ground, and when he picked it up, it went off.

The investigating officer testified that after canvassing the neighborhood, he found two witnesses, George Richardson and Fred Minter, and took statements from both of them. The parties stipulated to admit Minter’s statement because he was not present to testify.⁴ At trial, George Richardson testified that he overheard the two men arguing about something Shearill had said about Mingo’s son. Richardson saw Mingo following Shearill closely as he walked down the street and holding a gun at his side. When they got closer to Richardson’s house, Shearill said something to Mingo like “leave me alone, I ain’t got time or something and kept walking.” Suddenly Mingo fired his handgun downward toward Shearill and the ground. Richardson testified that he did not realize Shearill had been shot until he saw Shearill’s leg begin to bleed.

The trial court stated that it did not believe Mingo’s version of events in light of the fact that Shearill, whom the trial court did find credible, and two witnesses indicated that Mingo had a gun and fired it at Shearill. The trial court also found that Mingo did not discharge the gun accidentally. However, because the testimony indicated that Mingo kept the gun pointed down at all times, the trial court was not convinced beyond a reasonable doubt that Mingo fired the gun with the intent to inflict great bodily harm less than murder. Accordingly, the trial court convicted him of the lesser offense of felonious assault.

II. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁵

⁴ Although Minter’s statement is attached to Mingo’s brief on appeal, it was not read into the record and does not appear in the lower court record. Accordingly, we cannot consider it. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) (a party may not expand the record on appeal).

⁵ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. Felonious Assault

Mingo argues that the evidence was insufficient to support his conviction because Shearill's testimony indicated that he was not in fear of being harmed; therefore, Mingo did not have the requisite intent to establish felonious assault. However, the prosecutor did not have to establish that Mingo intended to place Shearill in fear of being harmed; he only had to establish that Mingo intended to injure Shearill. This is clear from an examination of the elements of felonious assault, which are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure *or* place the victim in reasonable apprehension of an immediate battery."⁶

The testimony that the trial court found credible indicated that when Shearill told Mingo he was not afraid of Mingo or the gun, Mingo pointed the gun at Shearill's legs, fired the gun, then asked, "what you going to do now, huh?" Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime,⁷ and the trial court was permitted to infer Mingo's intent from his conduct and statements as well as from the facts and circumstances of the case, including Mingo's acts and the means employed to commit the assault itself.⁸ The testimony was sufficient to establish that Mingo intended to injure Shearill. Further, the "intentional discharge of a firearm at someone within range is an assault."⁹ The trial court explicitly rejected Mingo's explanation that the gun fired unintentionally as not credible, and we will not interfere with this determination.¹⁰ Therefore, we find that the evidence was sufficient to prove beyond a reasonable doubt that Mingo committed a felonious assault.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.¹¹ This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."¹² We review the trial court's factual findings for clear error and review de novo its constitutional determination.¹³ Because Mingo failed to raise this claim in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record.¹⁴

⁶ *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (emphasis added).

⁷ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁸ *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970).

⁹ *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

¹⁰ See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

¹¹ *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

¹² *Id.* at 579.

¹³ *Id.*

¹⁴ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

B. Failure To Call Witnesses

To establish ineffective assistance of counsel, the defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.¹⁵ Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.¹⁶ To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."¹⁷ In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.¹⁸ The defendant must also show that the proceedings were "fundamentally unfair or unreliable."¹⁹

Mingo contends that trial counsel was ineffective for failing to call and present certain witnesses to establish a defense, specifically, Fred Minter. However, the decision whether to call a witness is a matter of trial strategy, and we will not second-guess that strategy with the benefit of hindsight.²⁰ Further, Minter's statement to the police was read into evidence, and Mingo does not explain how having Minter testify in person would have produced a different result. Mingo has not identified the other witnesses he claims should have been produced, and there is nothing in the record to indicate how they would have testified if called. Mingo's representations regarding what these witnesses would have testified to is not sufficient to show "that these witnesses exist, or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record," and Mingo's argument that he was denied effective assistance of counsel is meritless.²¹

Mingo's remaining claims regarding ineffective assistance of counsel were not included in his statement of questions presented on appeal, and therefore, we decline to address them.²²

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

¹⁵ *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

¹⁶ *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

¹⁷ *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

¹⁸ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

¹⁹ *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

²⁰ See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

²¹ *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

²² See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (2000).